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No. 92-205

In The Supreme Court of the United States

OCTOBER TERM, 1992

FREDERICK A. GROSS, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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In our petition, we contended that the circuits are in clear and irreconcilable conflict over an important and recurring question that is well presented in this case – whether a defendant in a criminal case who makes out an adequately supported defense of good faith is entitled to have the jury specifically instructed on his good faith defense. We further contended that review by this Court is necessary to bring

uniformity to the manner in which juries are instructed on a defendant's good faith defense theory.

The government does not contest the fundamental propositions advanced in the petition. It "agree[s] that good faith is a defense" to the crimes charged (Br. in Opp. 6) and that petitioner was entitled to instructions from the court that "adequately informed the jury of that defense" (*id.* at 6-7). It further acknowledges (*id.* at 12) that the question whether the district court must specifically inform the jury of the defendant's good faith theory is one "that divides the courts of appeals." It concedes (*id.* at 11 n.5 & 10) that the Third Circuit in this case "broadly" adopted the rule followed by the First, Second, Fifth, Ninth and D.C. Circuits – that a specific instruction on good faith is not necessary – in square conflict with the rule of the Eighth and Tenth Circuits that such a specific instruction is required. Finally, the government candidly recognizes (*id.* at 12-13) that should this Court decline to grant certiorari in this case, the dispute among the courts of appeals will lead to a lack of "uniformity of practice."

Having conceded these points, there would appear to be no valid basis on which to oppose the grant of certiorari in this case. The government nevertheless offers a hodgepodge of arguments aimed at dissuading the Court from resolving an issue that divides the courts of appeals. None of these arguments has merit.

1. The government's principal argument in opposing review (Br. in Opp. 6-9, 12) rests on the remarkable assertion (*id.* at 7, 12) that this Court already has "answer[ed]" the question presented here in a manner that supports the holding below. But the government's claim (*id.* at 7) – never before voiced at any stage in the proceedings below – that this case is "controlled by" the Court's 16-year-old *per curiam*

decision in *United States v. Pomponio*, 429 U.S. 10 (1976), is insupportable.

To begin with, the government's submission, even if correct on the merits, is beside the point here: *Pomponio* was decided some eight years *before* the split in the circuits on this issue arose and the Court's opinion in that case does not give even the appearance of resolving the question over which the courts are in conflict. Not surprisingly, then, we are not aware of, nor has the government identified, a single court of appeals that has rested a decision on the question presented here on the authority of *Pomponio*. Thus, assuming *arguendo* that *Pomponio* would have been controlling had the issue arisen ten years ago, review is necessary today to clarify the law and to set straight those courts of appeals that have rendered decisions in conflict with a decision of this Court.

In fact, however, *Pomponio* plainly is not controlling. The principal holding of *Pomponio* clarified that the "willfulness" element of a charge under Section 7206(1) requires proof only of "an intentional violation of a known legal duty." 429 U.S. at 11-12. The Court went on to state that the district court had "adequately instructed" the jury on "willfulness" and that "additional instruction on good faith was unnecessary." *Id.* at 13.[1] Significantly, since the instructions actually given in *Pomponio did* include specific references to defendants' theory of defense (see *United States v. Pomponio*, 429 U.S. 10 (1976), Pet. at 13-14 (No. 75-

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[1] By that language, however, *Pomponio* did not purport to state a broad rule applicable in all cases where an instruction on good faith is requested; the question as to the adequacy of the jury charge had been raised in the petition not as an issue that would independently warrant review, but to obviate the need for a new trial if petitioner were successful on the merits of the main question presented. See *United States v. Pomponio*, 429 U.S. 10 (1976), Pet. at 12-13 (No. 75-1667).

1667), the precise question presented here – whether *standard* instructions on the willfulness element are sufficient to convey a defendant's good faith defense to the jury – simply was not an issue in the case.

2. In arguing that the conflict among the courts of appeals does not warrant review, the government asserts that there is a decisional "trend" against the requirement of a specific instruction on good faith. Br. in Opp. 10. But the government has pointed to nothing in the decisions of the Eighth and Tenth Circuits that even remotely suggests that those courts are likely to abandon their clear precedent on the instruction issue. To the contrary, the government simply disregards the many cases cited in the petition (at 13 n.9) demonstrating that the rule that "general instructions on willfulness and intent are insufficient to fully and clearly convey a defendant's good faith defense to the jury" is firmly entrenched in the jurisprudence of the Tenth Circuit. *United States v. Haddock*, 956 F.2d 1534, 1547 7 n.11 (10th Cir. 1992), on reh'g, 961 F.2d 933 (1992), pet. for cert. filed, 60 U.S.L.W. 3881 (June 15, 1992) (No. 91-2016) (on other ground).[2] Given that the Eighth Circuit has shown no sign of retreat from its precedent following the Tenth Circuit rule, and in view of the Tenth Circuit's very recent confirmation of its rule in *Haddock*, in which the court of appeals explicitly noted the contrary authority in other circuits and reaffirmed the continued vitality of the Tenth Circuit precedent,

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[2] The government also disregards the decisions of the Fourth, Sixth and Seventh Circuits which were shown in the petition (at 14-15) to be in accord with the proposition that a defendant is entitled to have an instruction *specifically* informing the jury of his theory of defense. The government offers no reason to assume that these courts of appeals will abandon established precedent and go with the "trend" if the precise question over which the circuits are split were presented to them.

it is highly unlikely that the conflict will be resolved in the absence of review by this Court.

3. The government's additional argument (Br. in Opp. 11-12) that review is not warranted because the decision in this case does not present a sufficiently "square conflict" with any specific decision of the Eighth or Tenth Circuit is wholly without substance. The government hypothesizes that the Eighth and Tenth Circuits might not apply their rule in cases involving false statement offenses. Yet as the government itself acknowledges (Br. in Opp. 12), the Tenth Circuit has "stated its rule regarding the need for a good faith instruction in unqualified terms" and "has extended it to a variety of * * * offenses." There is no reason to suppose – and the government does not suggest one – that the Tenth Circuit would decline to apply its rule requiring a specific instruction on good faith to the type of false statement offense charged against petitioner. Nor is there any reason to imagine that the outcome would be different in the Eighth Circuit, which follows the Tenth Circuit rule. Indeed, not one of the Eighth Circuit decisions cited by the government (Br. in Opp. 11) is inconsistent with the rule stated in *United States v. Casperson*, 773 F.2d 216, 223 (8th Cir. 1985), that a defendant who properly requests a good faith defense instruction is entitled to a charge that "direct[s] the jury's attention to the defense of good faith with sufficient specificity."[3]

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[3] The government's description of the three Eighth Circuit cases it cites as "holding" with respect to false statement offenses that "standard instructions on knowledge and willfulness adequately present the good faith defense" (Br. in Opp. 11) is incorrect; two of those cases did not even consider let alone rule on that question and the third case is too murky to be read as stating such a holding. *United States v. Hildebrandt*, 961 F.2d 116, 118-119 (8th Cir. 1992), petition for cert. pending (filed

4. The government's final contention – that certiorari should be denied because "the existence of a different rule in some circuits, requiring the instruction to be given, is not as a general matter harmful or burdensome to the jury, the government, or the courts" (Br. in Opp. 12-13) – is fatally flawed in several respects. First, that argument is tautological: it is sound only on the assumption that the government's position is correct on the merits – that is, that instruction on the elements of the offense is sufficient and that a separate good faith instruction would not change the outcome. The Eighth and Tenth Circuits have concluded, however, that the absence of such an instruction *is* harmful to the defendant. Thus, this "reason" is of no weight in determining whether the conflict should be resolved by this Court.

Moreover, as we pointed out in our petition (at 17-18, 20), petitioner has undeniably suffered real harm from the decision of the Third Circuit not to follow the rule applied in the Eighth and Tenth Circuits. There simply is no denying the fact that the outcome in his case would have been

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July 2, 1992) (No. 92-5090), involved the question whether a *Cheek* instruction is required in a prosecution under 18 U.S.C. § 1001. In *United States v. Cegelka*, 853 F.2d 627, 628-629 (8th Cir. 1988), cert. denied, 488 U.S. 1011 (1989), the issue was whether specific intent to deceive or defraud is an element of the offense of making a false claim for Medicare payment, and thus whether the district court erred in refusing defendant's proffered instruction. Finally, in *United States v. Sanders*, 834 F.2d 717, 719 (8th Cir. 1987), although the court stated that it found the instructions given to "fairly and adequately contain the applicable law," the actual content of those instructions cannot be determined from the opinion. Thus, having no basis to know whether the charge included any additional instruction beyond the standard statement of the elements of the offense, *Sanders* cannot be read to stand for the proposition suggested by the government.

different – his convictions would have been reversed – had he been tried in the Eighth or Tenth Circuits.

More significantly, the district court's confusion regarding the respective rights of petitioner and co-defendant Searcy to instruction on the good faith defense caused petitioner affirmative harm when the district court gave a specific good faith instruction as to Searcy but not as to him. Whether or not defendants generally are entitled to a specific instruction on good faith, therefore, the district court conveyed to the jury, by "negative implication," the idea that petitioner's claimed good faith was not a valid defense. This, too, would not have happened in the Eighth or Tenth Circuit and, indeed, is an independent flaw that requires reversal of the convictions even if the Court were ultimately to uphold the rule adopted by the Third Circuit on the issue presented.

For the foregoing reasons and those given in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted.

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